Cases and Material on

ADMINISTRATIVE LAW

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Volume 1

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CHAPTER I INTRODUCTION

1. The Scope of this Book

In a broad sense administrative law is the law relating to public administration. This would include all the legal aspects of the organization of government and the relations between the government and the public and its employees. The scope of this book is more restricted as it deals only with those aspects of public administration which are of particular concern to lawyers. The concern will not be with government in general but with those situations in which government action affects the rights of individuals.

The substantive body of rules developed by administrative boards and tribunals also lies outside the scope of this text. For instance, the law developed by planning appeal boards lies within Planning Law, that developed by labour relations boards within Labour Law, that of unemployment insurance commissions and welfare appeal boards within Income Security and Poverty Law. It is interesting to note that a marked feature of the expanded law school curriculum of the late 1960's was the inclusion of many new courses which deal with the substantive law and policy developed by administrative boards and tribunals. This development makes it possible for an introductory administrative law course to concentrate on procedural and jurisdictional issues common to all boards, tribunals and other government agencies and to leave the substantive detail to the specialized courses.

This book is largely concerned with questions of the legality of government action and with the role of the courts in ensuring that the government stays within the powers granted it by law. Typically administrative law is used to determine the scope of governmental power and to review the manner in which such power is exercised. It should not be thought that this emphasis leads to sterility or narrow technicality for, as will soon become apparent, there is a vital interrelationship between procedure and substance. Thus not only is the procedure adopted by government worthy of study in its own right, but, as well, because procedure shapes the substantive outcome of all administrative programs.

Much of this book is concerned with the role of the courts in the administrative process. This is what is loosely described as "judicial review". Despite its great and growing importance, judicial review does not define the universe of administrative law and this is reflected in the inclusion of a good deal of material on the actual workings of the administrative process. However, this is not a book on public administration and these explorations into the administrative process outside of the traditional areas of judicial review must be limited to those matters of more immediate legal significance.

2. The Size and Complexity of Modern Government

Before embarking on a study of administrative law it would be well to recall the size and complexity of modern interventionist government. During the last hundred years the conception of the true sphere of governmental activity has been transformed. Instead of confining itself to defence, public order, the criminal law, and a few other general matters, the modern state also provides elaborate social services and undertakes the regulation of much of the daily business of mankind.

New techniques of government have had to be devised to meet the ever increasing political demand for an active, interventionist state. Of particular importance for the development of administrative law has been the almost complete overthrow of a simplistic notion of the separation of powers in which the legislative power is granted exclusively to the legislature, the judicial power exclusively to the courts and executive power exclusively to the executive.

The two most prominent characteristics of the growth of positive government from an administrative law perspective have been the massive use of the legislative power delegated by parliament to administrators and the rise of a whole range of administrative tribunals, boards, commissions and the like which often exercise what amount to judicial powers. While such bodies have long existed in the Anglo-Canadian legal system the range of their powers has greatly increased of late.

The first and most important thing is to appreciate that the growth of administrative tribunals and other regulatory bodies has not been the result of any rationally planned design for government but has come about as a pragmatic response to felt needs. The progeny of this pragmatism constitutes an extraordinarily rich array of boards, tribunals and commissions ranging from major federal regulatory commissions which employ support staffs of over 500 to part-time boards which operate without any permanent staff at all.

A recent survey which included only permanent bodies (thereby excluding a large number of ad hoc inquiries, investigations and the like) and which included only general marketing boards and not particular product boards, concluded that there are approximately 640 administrative tribunals, boards and commissions in active existence in Canada today. Of these, some 60 are federal and there are, depending on size, from 40 to 80 in each province. An inventory of Ontario agencies, boards, commissions, and advisory bodies compiled in 1977 for the Ontario Economic Council identified 36 regulatory bodies (not including 22 specific product marketing boards); 44 licensing appeal bodies; 8 compensation bodies; 19 arbitral bodies and 95 advisory bodies.

It is possible to classify many of this multitude into three main types. First are what may be called social welfare appeal boards; the second, regulatory bodies and the third, non-partisan specialist decision makers.

Examples of the first classification are the Unemployment Insurance Commission (UIC), provincial social assistance appeal tribunals and workers' compensation boards. The second classification can be divided in two--government regulatory commissions such as, at the federal level, the Canadian Radio-television and Telecommunications Commission (CRTC), the Canadian Transport Commission (CTC) and the National Energy Board (NEB) and the national farm marketing boards; at the provincial level, public utilities boards and other farm marketing boards. Second, professional regulatory bodies which exercise statutory powers granted them by the provincial legislatures such as law societies, medical and dental associations and societies of architects, teachers, nurses and the like.

The third general classification, non-partisan specialist decision makers, covers a number of matters which have been "taken out of politics." Examples at the federal level would be the Immigration Appeal Board, the Tariff Board and the Anti-Dumping Tribunal. At the provincial level examples might include liquor licensing boards, labour relations boards and planning appeal boards.

In very general terms it may be said that tribunals have been preferred over courts because they hold out the promise of greater informality in procedure and flexibility in decision making; need not be as expensive as courts; can act with greater expedition; and will normally bring a higher degree of expertise to the resolution of complex problems than can be expected from judges who by training and experience are usually generalists, not specialists. The weight given to each of these factors varies with the particular tribunal but, again, it is possible to generalize, at least to some extent, by following the threefold classification previously adopted.

With respect to social welfare appeal boards the object is to establish an informal, inexpensive system of appeals which can cope with large numbers of applications. For instance, the Unemployment Insurance Commission has to deal with between 700,000 and 1,200,000 claimants each month. While the vast majority of these claims is dealt with routinely, there were, for example, 40,758 appeals to the first level of appeal, the Board of Referees in 1974. Of these 14.3% were successful. There were 341 further appeals to the Umpire (the final level of appeal) of which 41% were successful.

The same factors of inexpensive mass adjudication do not apply to regulatory bodies which deal with far fewer matters and should act with much greater thoroughness by concentrating their resources on a few major cases each year. It certainly would not be a mis-allocation of resources for the CRTC to spend a number of weeks on a Bell Canada rate case involving an increase of several hundred million dollars a year and affecting the quality of communications services across Canada. Similarly, it would not be wasteful for the Air Transport Committee of the CTC to spend 10 days or more on a general rate increase for all domestic airlines or a week on an important route allocation case which would affect the structure of airline service across the country. While the CRTC does deal with some 1,000 licence renewals every year and must, as result, ration its time carefully, it can, and does, spend a good deal of time on

those issues which transcend individual licence applications such as consideration of the desirability of Pay-TV, Canadian content regulation and the net work licence renewals of CBC and CTV.

In regulatory matters the emphasis is on expertise and, to some degree, on dispassionate, independent decision-making. While there is considerable current controversy as to the degree to which policy making should be undertaken by regulatory commissions, their broad mandate to supervise as well as regulate makes this task an entirely inappropriate one for a traditional court of law. Moreover, the broad social and economic considerations which have to be taken into account in regulation call for procedures far removed from those employed by the courts. On the other hand, when a professional body proceeds to discipline one of its members, it will have to adopt something quite akin to court like procedure as will a government regulatory commission should it contemplate revoking a licence. From all this it will be seen that not only are administrative tribunals a strikingly diverse collection of bodies but that individual tribunals must, on occasion, act very much like a court in dealing with a specific matter such as a licence revocation and then proceed to act very much more like a legislature in devising on-going regulatory policy. Administrative tribunals may thus be said to constitute a variegated collection of chameleon like bodies each adapted to its own general task but capable, as well, of changing to cope with specific tasks which fall within its general competence.

In the third classification, non-partisan specialist decision-makers, the factors to be emphasized vary greatly with the particular tribunal. The most prominent characteristic of the Immigration Appeal Board and provincial liquor licensing boards is that they can make independent, non-partisan decisions on matters which, experience has shown, can be politically embarrassing to government. Expertise is the dominant feature of the Tariff Board and the Anti-Dumping Tribunal while in labour relations boards expertise and non-partisanship as reflected in the use of tripartite boards (with a representative from labour, a representative from management and a neutral chairman) are at a premium. Informality is important in liquor licensing boards and in the Immigration Appeal Board because it is expected that there will be direct citizen participation before these bodies while the same is not true of the Tariff Board or the Anti-Dumping Tribunal where expertise and formality are more the order of the day.

3. The Politics of Judicial Review

Much of this book is concerned with the part played by the courts in the business of government. We shall see that generally the courts exercise a checking function over unlawful administrative action or inaction. On occasions, however, they are asked to make

an original determination of an issue - e.g., whether an individual who claims to have been injured as the result of some unauthorised conduct by a public official or authority is entitled to recover damages. Even here, though, the matter will only come before the courts because the agency of government involved has decided not to satisfy the claim made upon it.

It should not be inferred from the emphasis placed in this book upon the activities of courts that Judicial Review is always a Good Thing, and the More the Better. Lawyers should always recognize the possibility that the traditional values of the legal profession and the familiar methods of resolving disputes in private law are not necessarily applicable in resolving all disputes between the individual and the state, or even those disputes between individuals for the resolution of which the legislature has created or sanctioned specific and distinctive institutional arrangements.

One of the pervasive themes of administrative law is the development of criteria for making appropriate allocations of decision-making responsibility. As lawyers we are particularly interested in attempting to develop criteria by which to determine in what circumstances and to what extent the courts are, and ought to be, permitted or encouraged to intervene in the discharge by public authorities of their functions. What follows should make it clear that there are few answers of universal applicability to such general questions as 'is judicial review a good thing?' But before becoming immersed in the particular, it may help to focus your critical faculties to consider the following arguments that may be made against and in favour of judicial intervention. You may find it helpful to refer back to this list as you proceed, although before long it should seem (if it doesn't already) pretty elementary.

A list of the factors militating against involving the courts in reviewing the decisions of statutorily created bodies might include the following items:

(1) The institution of proceedings (with the possibility of further appeals) will delay the work of the agency. Once it is clear that legal proceedings are imminent it will often be inappropriate for an administrative agency to proceed further with the matter; indeed, a court may in some circumstances grant an interlocutory order requiring it to abide its final determination. The time and effort required of agency personnel in preparing for litigation may well have a serious adverse effect upon other aspects of the agency's work. The limited resources alloted to public authorities to enable them in the public interest effectively to administer a particular programme should not lightly be allowed to be dissipated in the conduct of litigation.

(2) Our system for the administration of justice is not financed out of the costs paid by losing parties; judicial time and court resources are not unlimited and have to be rationed. Once an administrative agency (also financed by public funds) has determined an issue - often after a trial-type hearing - there must always be good reason to justify a second round of argument and decision.

(3) Courts of law have a number of institutional limitations that make them unsuitable for resolving most problems that arise in the course of administration. First, our judges are, in the main, generalists, although a number will be familiar with the particular legal framework within which one or more of our multifarious agencies operate. The jurisdiction of the Divisional Court of the Supreme Court of Ontario and of the Federal Court of Canada includes a substantial amount of administrative law, and they are the closest that our system comes to having 'specialist' administrative law courts of wide jurisdiction. Even so, there is a high probability that in many instances judges will bring an inadequately informed mind to bear upon complex problems, the satisfactory solution of which requires an expertise not usually found in courts of law. Indeed, the administration of the legislative scheme may have been entrusted to an administrative agency in the first place precisely to avoid the expense, delays and patterns of reasoning typically associated with the "ordinary" courts of law.

Secondly, the complexity, implications and ramifications of many of the issues facing administrative agencies may be obscured or distorted by an attempt to extract from them "pure questions of law" upon which the actors in the litigation process may focus their attention. Just as judges are aware of the limited utility of formulating legal rules in the abstract, rather than against a background of particular facts and actual disputes, so they should look sceptically at invitations extended to them to pronounce on the "law" when they have only a limited knowledge of the administrative background from which a question of "law" has been distilled. The price of attempting to do "justice" between the parties before the courts may upset the proper working of the administrative scheme in ways not apparent to a judge, and thus cause hardship to those not before the court.

Thirdly, a court that does not become seised of a case as a matter of original jurisdiction is often less well placed than the decision-maker of first instance to make those findings of fact that may depend upon seeing and hearing the witnesses in person. A further limitation is often present in proceedings in which a court is asked to review the findings of an administrative tribunal; for the "facts" with which such a body may be concerned are often not of the type that can be suitably determined by normal trial procedure, but depend upon informed policy judgments or upon an expertise that comes from regular exposure to the issues in question.

(4) Judges are not politically accountable for their decisions. One of the premises of our system of government is that there are no "experts" to whom we are prepared to abdicate the power to make decisions that involve fundamental questions of the ordering of priorities and values, at least, not without ensuring that there is institutional machinery through which they may be made answerable to the governed. To allow judges to enter fields of inquiry more appropriately left to politicians is likely to have the effect both of diminishing responsible government and of undermining public confidence in that degree of impartiality expected of the judiciary, in the discharge of its proper functions.

(5) It is a distortion of the complexities of the modern state to assume that the courts are charged by our constitution - or our constitutional traditions - with the unique role of deciding questions of law. Our legislatures have in fact entrusted a great number of different bodies with the interpretation, development and application of the law that governs particular aspects of activity with which they are concerned. The "law" administered in "ordinary courts of law" is merely one of a number of systems of law that co-exist in our society.

Considerations of this sort have to be balanced against arguments of the following kind that would support a more active judicial role.

(1) It is erroneous to suppose that the specific statutory framework under which a particular administrative agency operates can be viewed in isolation from the wider legal world in which it exists. If the legislature intended to exclude the normal presumptions of statutory interpretation used by the courts, and to sever all connection between the language of the legislation and the meanings that courts would foreseeably give to the words used, it would have so provided.

(2) It is ridiculous to assert that all administrative agencies are staffed by enlightened "experts" whose determinations of individual rights are invariably based upon a thoughtful interpretation of the relevant legislation - an interpretation informed by a proper appreciation of the legislative history, the statutory text and the nature of the agency's functions. There are enough administrative tribunals whose members are drawn from the lower echelons of party political life and the calibre of whose staff is less than inspiring, to justify the conclusion that it would be intolerable to grant them definitive decision-making power over important aspects of people's lives. Moreover, administrative decisions are not infrequently taken without any careful consideration of whether they are authorised by the relevant legislation; and even when a legal opinion from an official is solicited, it will not necessarily have been tested by being subjected to counter-arguments presented at a hearing.

(3) Experience suggests that the behaviour of bureaucrats, like that of the rest of us, if left undisturbed by external forces, tends to settle into comfortable patterns. The fact that a particular situation has always been dealt with in a particular way can quickly become the reason why it should (or could) never be handled in any other way. Bureaucratic tendencies towards both aggrandisement and inactivity may be reduced by the injection of scrutiny by institutions that are somewhat removed from the daily routine, influences and patterns of thought of the administrative agency. It may be particularly appropriate to enlist the assistance of the courts to settle a point upon which the agency has not yet adopted a considered view or where agency decisions are inconsistent. Moreover, some forum for settling disputes between two or more levels or agencies of government is often required.

(4) The other side of the coin of the judges' political non-accountability is their independence from the Executive and their relative insulation from the kinds of pressures commonly exerted by interest groups upon politicians and administrators. Nor can the political process be relied upon to provide satisfactory remedies for all grievances that individuals believe that they have suffered at the hands of officials, particularly when the individuals affected carry little political weight, or the issues involved are complex, or the matter is unlikely to arouse public interest. Access to the courts is not dependent upon considerations of this kind.

(5) Ombudsmen and other institutions -both official and unofficial - are undoubtedly most valuable in the resolution of disputes between individuals and some agency of the state. None, however, possesses the degree of public confidence enjoyed by judges of superior courts whose independence of the Executive is constitutionally guaranteed. The power of the courts to back with the authority of the state the orders that they make when disposing of a case is a vital protection to the individual against the power of modern government.

The question that you will have continually to ask yourself as you proceed is, "How do these considerations balance out in this particular context - bearing in mind the language of the relevant statute, the nature of the dispute, the interests affected, the composition and functions of the public activity and the political accountability, and the type of legal proceeding in which the issue has arisen?"

4. An Introduction to Remedies

A decision has been made to postpone any detailed analysis of the remedies until the end of this book. Yet without some knowledge of the remedies employed in administrative law, it will not be possible to fully understand the cases considered at the outset. What follows is a very brief outline of the most important characteristics

of the remedies such as will carry the reader through until the chapters which deal specifically with remedies issues.

One of the initially confusing aspects of judicial review of administrative action is the system of remedies by which substantive and procedural rights are vindicated in the courts. Part of the difficulty is purely terminological. The purpose of certain remedies is not readily apparent from the Latin tags which are used to describe them. Beyond this, however, there are also serious problems as to the limits of virtually all the remedies, including some of the recent statutory replacements of the old mechanisms of judicial review.

Traditionally associated with the law of judicial review are the prerogative writs, ancient in origin and replete with technicalities. The title "prerogative" is applied to them because of the fact that they emanated from the English monarch and the Court of King's Bench. This is indicated even today in the names of cases in those provinces where these remedies survive. Regina v. Labour Relations Board, ex parte Jones indicates that the Labour Relations Board is being called to account in the courts. The real applicant for relief is in fact Jones but, because of the historical association of the monarch with the writs, the technical plaintiff on the record remains the Queen, reflecting the fact that in their earliest days the prerogative writs were most commonly associated with the sovereign calling inferior courts to account either in front of the sovereign himself or before the sovereign's court.

Most famous of the prerogative writs and those which remain in common usage today are those of mandamus, certiorari, prohibition, habeas corpus and, somewhat less significant, quo warranto. The Latin titles of four of these five writs are derived from the key words in the summons going out from the court to the official under challenge: - Mandamus = we "command" or "order" you to perform a public duty; certiorari = produce the record of your proceedings so that we might be "informed" or made "more certain" as to its validity; habeas corpus = let us "have" the "body" of the person whom you have in custody so that the validity of his detention can be checked; quo warranto = by what "warrant" or "authority" do you claim to exercise this statutory power? Prohibition is more immediately obvious. It is a writ by which the courts prevent or prohibit a statutory authority from proceeding with a matter over which it has no authority or jurisdiction.

In combination, these five remedies presented a fairly comprehensive relief package for keeping various statutory authorities inferior to the court of King's Bench under control. Indeed, as we shall see in the section on remedies, there is a degree of overlap as between them. Nevertheless, as the law relating to the remedies developed, gaps appeared and partly as a result of this, litigants began to invoke in aid of their attempts to secure redress for their grievances two other originally private law remedies - the equitable remedy of injunction and another remedy with equitable origins, the declaration. Of particular

importance here was the availability of these two remedies against a broader range of statutory authorities than either prohibition or certiorari, the ability of litigants to combine an action for these two remedies with a claim for damages and, in the course of that action, to obtain discovery and call witnesses, none of which was possible with the prerogative writs, and, finally, once again in contrast to the prerogative writs, the availability of declaratory relief against the Crown.

To this common law system of remedies was also added in all jurisdictions varying quantities of statutory overlay with the creation of particular forms of statutory remedy in the courts, including most significantly numerous statutory appeal provisions.

Discontent with the prerogative writs also led in time in all the Canadian provinces to a considerable simplification of the procedures by which they were sought. In recent times, in four jurisdictions, matters have moved somewhat beyond procedural simplification. Quebec, whose public law is the same in origin as the common law provinces, combined certiorari and prohibition into a new remedy: evocation. Ontario and British Columbia enacted Judicial Review Procedure Acts (S.O. 1971, c. 48 and S.B.C. 1976, c. 25) creating a new, virtually comprehensive remedy called an application for judicial review. Finally, the Federal Court Act, S.C. 1970-71-72, c. 1, not only established a federal court with general judicial review authority over the affairs of federal statutory bodies but also created a new remedy for judicial review matters coming within the original judicial review authority of the Federal Court of Appeal, though at the Trial Division level the prerogative writs and injunctive and declaratory relief are still the order of the day.

This then is a brief introduction to the tools of judicial review with which you will become much more familiar as the course progresses. Most of these remedies will crop up again in the first ten chapters of the book in which you will be considering the substance of judicial review of administrative action. Then, in the last section, the remedies will be returned to specifically for a more detailed study of their origins and the principles upon which they are available.

One of the major concerns of the chapters on the various remedies is their efficacy. Does this remedial system that the courts and the legislatures have fashioned serve adequately the substantive law of judicial review? Anticipate this concentration by asking this question every time you encounter a case in the chapters on the substantive law of judicial review in which remedies considerations have intruded. Consider also the questions: How often do remedies really matter? To what extent is every case about remedies really a case about the substantive limits of judicial review? Finally, in studying the cases on the substantive law of

judicial review, in anticipation of the section in Remedies about standing, always look at the applicant. What interest is this applicant trying to vindicate? Irrespective of the merits of his substantive arguments, is he someone about whom the law should be concerned?

5. About this Book

This is a draft version of what will be a comprehensive Canadian casebook on administrative law. As with all new ventures, initial enthusiasm led to an under-estimation of the time involved in such an undertaking and the value of the actual use of any new set of teaching materials in the classroom. While we are confident that we have produced a worthwhile book we intend during the next year to undertake revisions both to fill in gaps of which we are already aware and in response to suggestions from those who will be using this draft edition in their teaching.

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CHAPTER FIVE BIAS

PART II NATURAL JUSTICE

INTRODUCTION

This Part is composed of two topics, procedures and bias. They are in the same part because they are the components of a larger topic, natural justice, and because they share much history and doctrine, particularly doctrine about entitlement. However, functionally they are substantially different, and can be studied separately. Chapters two, three, and four are about procedures, and chapter five is about bias. This introductory note is about procedures.

The topic is the procedures that agencies are required to use, and should use, and more particularly, the procedural rights that individuals and groups have to participate in making decisions. These rights to participate are not rights to vote, or to have some other powers to make decisions. Instead, they are essentially rights to present facts, ideas and opinions to an agency, and to test facts, ideas and opinions from other sources. The nature and extent of these rights are obviously important in any consideration of the decency of government.

A simple preliminary example of procedural requirements is professional discipline. Professional associations, such as law societies, and colleges of physicians and surgeons, or nurses are usually given powers to discipline members. The power to make an initial decision, at least, is usually assigned to a committee. If a committee proposes to consider disciplining a member for misconduct, it normally must give him or her a set of procedural rights that are usually and expressively called a hearing. It must give notice of the hearing, including enough information about the alleged misconduct to enable a response to be made, and it must disclose the information it has gathered about the member. At the hearing, the accuser, who is probably a senior member of the staff of the association, must present the information about the alleged misconduct, and the member may cross-examine witnesses, and present witnesses, documents, and personal statements. The committee must decide on the basis of the material presented during the hearing, but it may not have to give reasons. The eventual effect of its decision depends on the particular structure of the association and is not important to this example.

This example is simple, or at least it will appear simple in retrospect, for three reasons. First, and most important, the hearing is an adjudicative process, and closely resembles the trial process so familiar to lawyers. Second, the right to these procedures is fairly well settled, although we hasten to add that much may depend on the peculiarities of context and legislation--we have presented a simple example, not a comprehensive analysis. Third, the member

is probably entitled to the all or almost all of the full range of the procedural ingredients that courts have fashioned; the difficult and important problem of choosing some but not all of the ingredients is usually not a large issue. Different sets of procedures are required for different kinds of decisions, and for many decisions no procedural rights at all are required.

The law about procedures is composed of both common law, and legislation and regulations. The work of the courts is described in the excerpt from Willis Administrative Law and the British North America Act on page 000. This common law is substantially the same in England and in all the common law provinces. It is general, integrated, and independent, and can be described in a relatively short space—a few pages or a few hundreds. The law made by legislation and regulations is much different. It differs greatly among the provinces, and in each one it is a bewildering and diverse array, which defies generalized description. Some statutes and regulations govern the procedure of individual agencies, and others govern smaller or larger groups of agencies. Some specify a single procedural requirement, and others tend toward being a code of procedure. Some duplicate the common law, some expand it, and some impose requirements that are entirely different. Some examples are given in section one of chapter three. Only one general conclusion is clear; none of these statutes and regulations is sufficient itself, and independent of the common law. One statute needs specific comment. The Canadian Bill of Rights provides,

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

The meanings of some of these terms, and the possible interpretations of the entire provision will become clear during chapter two. Whatever the original hopes may have been, the provision

has had no substantial effect on procedural rights. Some of the cases in chapter two present the usual reasonings. In the United States, the Constitution gives a right to procedural due process, and we have included some cases about this right. The constitutional differences have not prevented considerable similarities in issues, reasoning and results, and we doubt that they have required the differences that also exist.

Agencies themselves establish many procedural requirements. Some are regulations; some are written, but not regulations; and some are unwritten, and are either consciously made and remembered or the products of unconsidered habit. Whether these requirements are "law" or not depends upon the context and purpose of the question, but they certainly determine much of what agencies and participants do.

The appropriate allocation of responsibility among the legislatures, the courts, and the agencies themselves for making the law about procedure needs to be considered throughout these chapters, although it is raised expressly in section one of chapter three. Initially, the general issue may seem to be simply which institution can best make this law, but some thought and experience demonstrates that it is too crude. Consider, for example, the need to make distinctions between general requirements, and elaboration and detail, and between giving a prod for making procedures, and responding to a prod. A closely associated topic is the competence of the courts to supervise the procedures of agencies, contrasted to the merits of the decisions they make. In the Introduction we described some general strengths and limitations of the courts for the supervision function. Do they have - actually or potentially - some distinctive competence about procedures, either because of their own structure, process, and experience, or by default, because they are likely to have so little knowledge about the substance of the agencies work? The short passage from Bazelon Coping With Technology Through The Legal Process on page 000 discusses this question.

Procedures are a study of two themes. The first is the entitlement to procedural rights, or the threshold. What are the kinds of decisions for which some procedural rights should be given to the individuals and groups who are affected? We have already said that procedural rights will normally be given for professional discipline. What about a decision to expropriate land by a municipal authority, an investigation of the affairs of a business corporation by a royal commission, an approval of a major industrial development by an environmental assessment board, and a failure of a student who has asked a faculty to consider emotional difficulties that affected performance on his or her examinations? Each of these decisions presents a difficult problem at the threshold; is it a decision for which some procedural rights should be given, to permit participation by the individual or groups affected? The second theme is the choice of the procedural rights to be given, assuming the threshold will be crossed. Consider each of the examples we have just given, and

especially the student who had emotional difficulties. What procedures are appropriate? Is an opportunity to present documents to the faculty enough? What about a rights to make an oral presentation or call witnesses?

These two themes are interdependent. Thinking about the threshold is incomplete or meaningless without also thinking about the kinds of procedures that will be required if the threshold is crossed, and thinking about choices of procedures is incomplete without thinking about the kinds of decisions for which they will be required. The two themes are essentially different perspectives on the larger and fundamental theme of the appropriateness of procedures for making decisions. However, the distinction is justified because doctrine has tended to separate the themes, and because it is convenient. Everything cannot be presented and studied at the same time.

The second chapter in this part, chapter three is a more intensive study of some of the procedural ingredients. It includes for example, studies of notice, lawyers, disclosure, and cross-examination. Chapter four is a study of the procedures for rule-making and policy-making, and the reasons for presenting it separately are postponed.

The law in these t w o chapters has changed greatly in the past fifteen years, and is continuing to change. Ultimately, each reader must assess the nature and extent of the change for himself or herself, but, nevertheless, we venture some general propositions. Three changes seem to us to be clear. First, the words used to express the doctrine have changed; second, the threshold below which no procedural rights will be given has been lowered; and third, the courts are more willing to make choices among the kinds of procedures, and expressly require different procedures for different kinds of decisions. Two other changes may have occurred, but if they have, they are much less clear. First, the procedural rights given for some kinds of decisions may have been diminished. (This may be associated with the willingness to require different procedures.) Second, the courts may be more inclined to consider particular decisions, rather than general classes of decisions.

Lawyers must also consider the effects of this law, on both the procedures of agencies generally, and the decisions they make. Of course, in any particular dispute, especially one that involves review, conduct and results may be effected by a wide range of influences, but consider instead, general tendencies and the vast multitude of decisions that are made without protracted dispute, without any thought for review, and perhaps even without any involvement by lawyers. We believe that this law and the values it expresses do tend to shape the procedures of agencies, either because the agencies share the values, or because they wish to stay comfortably far from review. We hasten to emphasize that this belief is about general tendencies; failures to comply occur, both randomly and chronically, caused perhaps by ignorance, habit, arrogance, or the sheer

inappropriateness of the doctrine. The effect of the law on results is much more difficult to assess, and conclusions may in the end be no more than expressions of faith. Hopefully the kind of participation that these requirements permit diminishes the effects of comfortable habit and inadequate or misguided attitudes, and permits presentation of facts, ideas, and opinions that would not otherwise be considered by the agencies.

We have already said that the fundamental theme is the appropriateness of procedures, and that different procedures are and should be required for different kinds of decisions. Consider two more examples; the first is a decision by a worker's compensation board about compensation for an injured worker, in which the issue is whether the injury occurred in the course of the employment, and especially the time and place at which it occurred. The second decision is one made by an environmental assessment board about the location of major electrical transmission line, in which a multitude of parties participate, including landowners and interest groups. There are disputes about the proposed location and the alternatives, including disputes about financial costs, the effects on wildlife, farming operations, scenery, and the reliability of the system, and disputes about the trade-offs to be made among these interests. The range of the participants and the interests at stake in these two decisions, the nature of the issues to be considered, and the choices to be made by the tribunals make different procedures appropriate for each decision.

Consideration of appropriateness requires a thorough knowledge and understanding of the structures and functions of agencies. For example, the procedures of a worker's compensation board must take account of the vast numbers of claims to be processed and the probable lack of skilled help for almost all the claimants. The procedures of an environmental assessment board must take account of the fact that some of the important issues are about values and preferences, and procedures appropriate for presenting and testing facts are not appropriate for presenting preferences. A lawyer who speculates about procedures without understanding functions of an agency takes a great risk of misunderstanding important issues, and, more generally, making legalistic and monolithic prescriptions. These needs to recognize differences, and to understand functions and structures are complicated by the large numbers and diversity described in the Introduction. Sheer numbers forbid treating each agency and each issue as unique. Inevitably generalizations and groupings must be made.

Last, we come to the justification for giving these procedural rights. The courts have understandably not undertaken comprehensive and abstract speculation, and the scholarly literature does not discuss justifications extensively and thoroughly, especially in contrast to the literature about other aspects of government. We suggest three justifications. First, participation in decisions of government by affected individuals and groups is in itself valuable, regardless of the result. Of course, voting or contributing to a

concensus are other forms of participation that may be justified in the same way. Perhaps they would be appropriate for some of the decisions now made by agencies, but they are inappropriate for others, for example, professional discipline. Second, these procedures contribute to making better decisions. This justification ultimately requires complex analysis about the criteria for assessing decisions; for some, arguably no criteria exist except the use of the process. However, for others, for example, professional discipline, or grant of worker's compensation or family benefits, the criteria seem to us to be clear, and for any decision, accuracy of fact finding and encouragement for clear and comprehensive thinking are desirable. The third justification is the use of the procedures as a means for making agencies accountable for the results; openness, disclosure, and the obligation to give reasons are especially valuable for this purpose. A discussion of justifications and criteria is Rabin, Some Thoughts On The Relationship Between Fundamental Values And Procedural Safeguards, on page 000.

Lawyers must seek to understand justifications (and continually reconsider them, because they cannot be absolute and eternal), and elaborate them, to enable specific procedures to be assessed and designed. This challenge is especially important in times of change, and if particular choices are to be made -- by courts, legislatures and agencies -- among the multitude of possibilities.

A preliminary explanation of the possible meanings of two terms, natural justice and hearing, may be useful. The phrase "natural justice" denotes a large body of law that is composed of law about procedures, and bias. The branch about procedure is often called the doctrine of audi alteram partem (listen to the other side). Until recently, it comprised the entire range of common law procedural rights. However, during the past decade, an expansion of rights has emerged under the banner of "fairness", which will be considered in section two of chapter two. This expansion has caused some uncertainty about the meaning of natural justice. It can include fairness, and this meaning still connotes the entire range of procedural rights. We have used it with this meaning in the title to this Part. However, it can also exclude fairness, and this meaning connotes only part, albeit the much larger part, of procedural rights. Neither meaning is "True". The cases must occasionally be read carefully to determine which meaning is intended, but no more is at stake than avoiding unnecessary confusion.

The word "hearing" usually, especially in the older cases, has virtually the same meaning as "natural justice", and often they are used together (the applicant is entitled to "natural justice or a hearing") or as alternatives. The association of hearing, and the listening of audi alteram partem is obvious. However, sometimes "hearing" is used to denote a more or less formal, trial-type process. It is occasionally difficult to know which meaning is meant, in part because of a tendency, especially in the older cases, to assume there is no difference.